Interplastic Corporation *and* Oil, Chemical and Atomic Workers International Union, AFL-CIO-CLC. Case 18-CA-6276

18 June 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 18 August 1982 Administrative Law Judge Steven M. Charno issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The question presented here is whether the Respondent has fully satisfied its backpay obligation to Joel Carr, whom it unlawfully discharged. For reasons fully set forth in the judge's decision and summarized below, we agree with the judge that the backpay specification should be dismissed and that the Respondent has fully complied with the Board's Order in the underlying proceeding.

The Respondent unlawfully discharged Carr, then a part-time employee, 1 June 1979. As a remedy for this violation, the Respondent was ordered, inter alia, to reinstate Carr to a substantially equivalent position without prejudice to his seniority. Pursuant to the collective-bargaining agreement in effect at the time of Carr's discharge, part-time employees did not accrue seniority. In the 5 months following Carr's discharge, the Respondent hired two full-time employees. On 20 February 1980 the Respondent laid off several employees, including the two postdischarge hires, for legitimate business reasons. Carr would have been laid off at this time if he had been working. In August 1980 the Respondent recalled the two employees it had hired after it had discharged Carr. The Respondent reinstated Carr to a full-time position in February 1981 after it had recalled all of the full-time employees who were laid off in February 1980.

In the backpay proceeding the General Counsel sought backpay for the period from August 1980 to February 1981.[1] The General Counsel contended that the Board's Order obligated the Respondent to treat Carr as if he had been reinstated as a full-time employee 1 June 1979 with attendant recall rights based on uninterrupted seniority. The General Counsel argued that, inasmuch as the Respondent had eliminated part-time positions 1 June 1979, Carr was entitled to reinstatement as a full-time employee because that was the closest "substantially equivalent position" to his prior position. If Carr had been a full-time employee from 1 June 1979, he would have had seniority and recall rights superior to those of the employees who were hired after he was discharged 1 June 1979. Some of those employees were recalled in August 1980. Accordingly, the General Counsel contended that Carr should have been recalled in August 1980.

In rejecting the General Counsel's contention and dismissing the backpay specification, the judge noted that Carr was a part-time employee when he was discharged, that part-time employees did not have seniority under the contract, and that the Board's Order in the underlying proceeding specified that Carr should have the same seniority that he enjoyed in his former position. The judge concluded that Carr was only entitled to reinstatement to his former part-time position and that, as a part-time employee, Carr's seniority and recall rights were junior to those of every full-time employee who was laid off in February 1980. Accordingly, the Respondent had no obligation to recall Carr before it did, and it did not owe any backpay.

Contrary to our dissenting colleague, we agree with the judge and find that the Respondent has fully complied with the Order issued in the underlying unfair labor practice case. We agree that Carr is not entitled to seniority credit as a full-time employee from the time of his unlawful discharge until the time of the lawful layoff. The Board's Order required the Respondent to reinstate Carr to his former job or a substantially equivalent position and mandated that Carr have the same seniority on reinstatement that he had in his former position. Because Carr was a part-time employee when he was discharged and part-time employees did not accumulate seniority, he was not entitled to the seniority of a full-time employee. Thus, we agree with the judge's finding that Carr's right to recall was junior to that of every full-time employee in the Respondent's employ at the time of the 20 February 1980 layoff. Accordingly, the Respondent had no obligation to recall Carr before it did. The fact that the Respondent eliminated part-time positions does not in any way serve to alter or enlarge the remedy given in this case.

We disagree with our dissenting colleague's conclusion that Carr is entitled to reinstatement as, and with the seniority of, a full-time employee on the theory that, absent his discharge, the Respondent would have converted him from part-time to full-

[1] The parties have reached a settlement as to the amount of backpay due Carr for the period from the June 1979 discharge to the time in February 1980 when he would have been laid off.

time status in the summer of 1979. We note that the Board did not find that the Respondent violated the Act by failing to convert Carr to full-time status after it eliminated part-time positions. In fact, no such violation was alleged. Treating Carr as if he would have been converted to full-time status, as our dissenting colleague would do, is tantamount to finding a violation never alleged nor found and then supplying a remedy for it. This would inappropriately enlarge the scope of the original Board Order beyond a remedy for the violation found. Accordingly, for these reasons, we find that Carr has been fully made whole for the losses suffered by virtue of his unlawful discharge.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the backpay specification is dismissed.

MEMBER ZIMMERMAN, dissenting.

This backpay proceeding involves a question whether the Respondent is obligated to make whole discriminatee Joel Carr for its delay in reinstating Carr after the end of a lawful layoff which postdated his unlawful discriminatory discharge. In particular, the question is whether Carr should have been credited with seniority such that after the layoff he would have been reinstated on 11 August 1980 rather than on 25 February 1981. For reasons discussed below, I disagree with the majority's adoption of the judge's conclusion that the Respondent has no backpay liability for this period.

On 25 March 1980 the Board issued an Order[1] adopting the Decision and Order of Administrative Law Judge Norman Zankel, finding that the Respondent had discriminatorily discharged Carr on 1 June 1979 in violation of Section 8(a)(3) and (1) of the Act. Carr was a part-time employee at the time of his unlawful discharge. He had previously worked full time for the Respondent but had requested and was granted part-time status to attend college. Two weeks prior to his discharge, Carr had requested reconversion to full-time status, but he received no response.

At the unfair labor practice stage of this case, the Respondent argued that its decision to eliminate its part-time positions was based on economic considerations and was pursuant to a company policy. Judge Zankel found, however, that no policy decision had been made by the Respondent and that its purported decision was merely a subterfuge to disguise its unlawful motivation. The Board's Order required the Respondent to offer Carr "immediate and full reinstatement to his former job, or if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges; and make him whole . . . for any loss of pay and other benefits suffered" by reason of the Respondent's discriminatory conduct.

In compliance negotiations, the General Counsel was informed that on 20 February 1980 the Respondent had a general layoff of its production workers, and that the unreinstated Carr would have been laid off had he been employed at that time. The General Counsel was not informed, however, that two of the full-time employees who had been laid off were hired after Carr's discharge. During ensuing negotiations, the General Counsel argued that Carr was entitled to backpay as if he had been a full-time employee since June 1979, while the Respondent contended that, because Carr had been employed on a part-time basis from 24 September 1978 until the date of his discharge, his backpay should be calculated as if he were a part-time employee. The Respondent also argued that, under the Board's, Order it was only required to offer Carr reinstatement to his former or substantially equivalent position, i.e., part-time status. Under the applicable collective-bargaining agreement, part-time employees did not accrue seniority. On 24 June 1980 the Respondent informed the General Counsel that Carr's reinstatement was subject to the seniority rights of those employees who were currently on layoff status. The next day, the parties settled the issue of the Respondent's prelayoff backpay liability to Carr.[2]

On 7 August 1980 the Respondent began recalling those employees it had laid off in February 1980. The Respondent, however, did not offer Carr a position until all of the full-time employees who were laid off in February 1980 were recalled. The two full-time employees hired after Carr's discharge were recalled on 11 and 27 August 1980. Carr was recalled by the Respondent to a full-time position in February 1981.

The backpay specification seeks backpay for Carr as a full-time employee from the date the Respondent first recalled a laid-off employee hired after Carr's discharge until 25 February 1981, the date of Carr's actual reinstatement. The judge found, however, that the Board's Order in the unfair labor practice proceeding required the Respondent to offer reinstatement to Carr with the

[1] No exceptions were filed by the Respondent to the judge's decision. The Order is not reported in Board volumes.

[2] The Respondent agreed to compensate Carr as a full-time employee for the period from 1 June to 30 September 1979 and as a part-time employee for the period from 1 October 1979 to 20 February 1980.

same seniority he had enjoyed in his former position. Because Carr was a part-time employee who accrued no seniority rights, the judge concluded that he was only entitled to recall to the first position available after the Respondent had recalled all full-time employees laid off in February 1980. Finding that no employees with less seniority than Carr were recalled prior to his actual reinstatement, the judge recommended dismissing the backpay specification in its entirety.

In exceptions, the General Counsel contends that under the circumstances of this case Carr was entitled after his unlawful discharge to be reinstated to full-time employment before the Respondent could hire any new full-time production employees. I agree.

By the Respondent's own admission in the underlying unfair labor practice proceeding, there were no part-time positions in existence in its plant after Carr's discharge. In fact, it is now undisputed that the Respondent eliminated part-time positions as a pretext designed to rid itself of Carr. Having found this conduct unlawful, I would not now permit the Respondent to reap the benefit of its own wrongdoing by reversing its prior stand and indulging in the fiction of a nunc pro tunc reinstatement, which never took place, to a part-time position, which no longer existed. On the contrary, it is well established that the Respondent bears the burden of its unlawful conduct and that any doubts about its liability must be resolved against it.[3] Under the circumstances, full-time employment should be substantially equivalent to the eliminated part-time production position. Under the Board's original Order, the Respondent should have reinstated Carr to that position after his discharge and prior to hiring new employees.

Alternatively, assuming arguendo that the Respondent could have reinstated Carr to part-time employment, I would find that the General Counsel has proved Carr's entitlement to conversion to full-time status, but for his unlawful discharge, prior to the hiring of new employees. In this regard, I rely on Carr's prior employment as a full-time employee; his undisputed qualification for such work; the Respondent's apparent satisfaction with his work performance; Carr's request for reconversion to full-time status; the parties' stipulation that the Respondent had previously granted an identical request by a part-time employee who had finished school; the obvious availability of full-time positions; Carr's ultimate recall to full-time work; and, finally, the Respondent's failure to offer any reason why it would not have honored Carr's request.

For the foregoing reasons, I would find that Carr was entitled to full-time employment after his unlawful discharge and before the Respondent hired any new employees in his production position. Giving full remedial effect to the seniority which Carr would have accrued as a full-time employee, but for the Respondent's unfair labor practice, I would find that the Respondent should have recalled Carr, rather than a junior employee, from layoff on 11 August 1980 and that the Respondent is liable to Carr for backpay.

[3] E.g., *Southern Household Products*, 203 NLRB 881 (1973).

SUPPLEMENTAL DECISION

STEVEN M. CHARNO, Administrative Law Judge. On March 25, 1980, the National Labor Relations Board issued an Order in this proceeding which directed Interplastic Corporation (Respondent), among other things, to offer reinstatement to and make Joel Carr whole for any loss of earnings resulting from Respondent's discrimination against him. A controversy having arisen over the amount of backpay due Carr, the Regional Director for Region 18 of the Board issued a backpay specification and notice of hearing on August 20, 1981. On September 2, 1981, Respondent filed an answer admitting certain allegations of the specification and denying others. A hearing was held before me in Minneapolis, Minnesota, on May 14, 1982. Briefs were filed under due date of June 18, 1982, by the General Counsel and Respondent.

FINDINGS OF FACT

I. THE UNDERLYING DECISION

Carr was discharged by Respondent on June 1, 1979. In a charge filed by the Oil, Chemical and Atomic Workers International Union, AFL-CIO, CLC (the Union) and in a complaint issued July 17, 1979,[1] it was alleged that Carr was discharged by Respondent in violation of the Act. The case was tried before Administrative Law Judge Norman Zankel who issued a Decision on February 13, 1980, which was later adopted by the Board and which contains several findings and conclusions of relevance to the issue of compliance.

First, Carr was found to be a part-time employee at the time of his discharge. It was noted that Carr had worked full time but had requested conversion to part-time status in order to attend college. It was further noted that, 2 weeks prior to his discharge, Carr had approached his immediate supervisor and requested conversion to full-time status. Neither the decision nor the record before me discloses whether that request was denied or, indeed, was referred by Carr's supervisor to other members of Respondent's management for consideration. It is clear, however, that neither the charge nor the complaint in this proceeding alleges that Respond-

[1] Official notice is taken of both documents pursuant to Respondent's request.

ent's failure to convert Carr to full-time status was unlawful.

Second, Judge Zankel rejected Respondent's contention that Carr was terminated because the Company had decided to eliminate part-time positions, and he concluded that Respondent's purported decision was merely a subterfuge used to disguise its unlawful motivation in discharging Carr. While the collective-bargaining agreements between Respondent and the Union in effect at all times material herein make provision for Respondent's employment of part-time workers, it was stipulated that Respondent did not employ any part-time workers between June 1, 1979, and the date of the instant hearing.

Finally, the decision contained a finding that Carr's discharge violated the Act and an order for appropriate relief. Judge Zankel's recommended Order, which was adopted in the absence of exceptions[2] by the Board's Order of March 25, 1980, required Respondent to offer Carr

> . . . immediate and full reinstatement to his former job, or if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges; and make him whole . . . for any loss of pay and other benefits suffered by reason of Respondent's conduct found herein to be discriminatory.

The collective-bargaining agreement between Respondent and the Union which was in effect at the time of Carr's discharge provided that part-time student employees "shall not be privileged to establish any seniority rights."

II. COMPLIANCE NEGOTIATIONS

On February 19, 1980, a letter was sent by the Regional Director for Region 18 to Terence M. Fruth, counsel of record for Respondent in the unfair labor practice proceeding, and Paul T. Lindgren, representative of the Union in that proceeding, with a copy to Marvin Weiss, Respondent's plant manager. This letter offered Respondent an opportunity to comply with the judge's decision and noted that offers of reinstatement to discriminatees must be in writing with copies provided to the Regional Director.

Shortly thereafter, Marlin O. Osthus, counsel for the General Counsel in the unfair labor practice proceeding, telephoned Fruth concerning the letter. In the course of one or two telephone conversations, Osthus was informed of the facts that, on February 20, 1980, there was a general layoff of production workers by Respondent and that Carr would have been laid off on that date had he then been employed by Respondent.[3] (Respondent laid off five full-time employees, two of whom had been hired after Carr's discharge. Osthus was not apprised of the fact that employees had been hired after Carr's discharge at any time during the compliance negotiations.) After discussing the manner of Carr's reinstatement, Osthus understood Fruth to agree that Carr would be assigned a June 15, 1979 seniority date for purposes of recall from the layoff.[4] After these conversations, Fruth assigned one of the associates in his law firm, Kathleen A. Hughes, to work on the case under the supervision of Fruth's partner, Frederick Finch.

On March 7, 1980, Osthus sent a letter to Finch and Lindgren which contained Osthus' calculation of the backpay due Carr and which stated in pertinent part:

> It is also my understanding that the Employer . . . will send Joel Carr a letter notifying him that he is on temporary lay off status, effective February 21, 1980, with seniority measuring from June 15, 1979 to February 21, 1980 for purposes of recall. . . .
>
> If the above, or the enclosed computations, do not conform with your understanding of the Employer's agreement to comply or with the agreement regarding backpay as discussed in separate telephone conversations with me during the past two weeks, please contact me immediately.

Immediately thereafter, Lindgren contacted Osthus to inform him that the backpay calculations in the March 7 letter were in error. Osthus wrote Finch and Lindgren on March 11, 1980, revising his backpay calculations and noting his agreement with the Union's contention that Carr was entitled to backpay as if he had been a full-time employee since June 1979. About March 15, 1980, a meeting was held between Finch, Hughes, and Osthus concerning compliance. This meeting was followed by several telephone conversations between Hughes and Osthus. Neither the meeting nor telephone calls concerned Carr's reinstatement or backpay.

On April 28, 1980 Hughes replied to Osthus' March letters. Her letter set forth Respondent's contention that, since Carr had been employed on a part-time basis from September 24, 1978, until the date of his discharge, his backpay should be calculated as if he were a part-time employee. The letter asserted that "[a]s a part-time employee, Carr was not entitled to any benefits, vacation or seniority under the collective bargaining agreement" and went on to state:

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[2] Although Respondent initially filed exceptions to Judge Zankel's decision, they were withdrawn by letter of March 11, 1980.

[3] At the hearing, the parties entered a stipulation as to these facts.

[4] The version of the telephone conversations set forth in the text is that of Osthus, who testified about them in a clear and straightforward manner with some precision of recall. While Fruth admitted that he had had discussions with Osthus at the time Respondent filed and withdrew its exceptions, he initially testified that he did not believe that he had discussed compliance. He then testified, "I have no recollection of discussing and I don't believe I did discuss with him, compliance." Finally, in response to a leading question by counsel for Respondent, Fruth affirmatively testified that he had not reached an agreement with Osthus. He based this statement, not on his memory of the conversations with Osthus, but on his recollection that compliance negotiations had been handled by his associates after the withdrawal of exceptions. Since the request to withdraw exceptions was dated March 11, 1980, and the conversations between Fruth and Osthus were stated by Osthus to have taken place between February 19 and March 7, 1980, the transfer of authority over this case to Fruth's associates would seem to provide no basis for Fruth's conclusion that he would not have been involved in the conversations. For the foregoing reasons, and based on my observation of the demeanor of the witnesses as they testified, I do not credit Fruth's affirmative testimony that the conversations described by Osthus did not take place.

In response to Carr's claim that he should be awarded backpay and preferred recall status based upon full-time employment from June 1, 1979, I refer you to the Administrative Law Judge's decision at page 21, lines 38–40:

> The Order shall require Respondent to offer Rick Shanor and Joel Carr immediate and full reinstatement to their *former or substantially equivalent jobs.* [Emphasis added.]

Carr's former job was as a part-time employee. There was no finding that the Employer discriminated against Carr by refusing to offer full-time employment.

Osthus regarded the quoted portions of Hughes' letter as "ambiguous" and effectively ignored them in his subsequent dealings with the Union's representative and counsel for Respondent.

In ensuing telephone conversations, Osthus and Hughes reached a compromise on the amount of Carr's backpay. The calculation of that amount was based on Carr's compensation as a full-time employee for the period of June 1 to September 30, 1979, and as a part-time employee for the period from October 1, 1979, to February 20, 1980. Osthus communicated the figure thus arrived at to Carr, who agreed to the amount. On June 20, 1980, a check for the agreed amount was sent to Carr who acknowledged receipt on June 25, 1980.

On June 23, 1980, Osthus wrote Finch concerning compliance with the notice provision of the Board's Order. Osthus supplemented this letter with a telephone call to Hughes asking her to send a letter setting forth Carr's recall status. On June 24, 1980, Hughes wrote Osthus:

> Joel Carr has not been reinstated due to a lay-off by the company of persons having greater seniority than Carr. Carr has been offered reinstatement subject to the seniority rights of five full-time employees currently on lay-off status. A check has been forwarded to the Board in settlement of Carr's backpay claim.

A June 26, 1980, letter from an official of Respondent to Osthus stated as follows:

> Interplastic Corporation hereby offers to reinstate Joel Carr to his former position as required by the order of the Administrative Law Judge. Carr's former position was as a full-time employee during the summer, June 1 to September 15, and as a part-time employee for the remainder of the year. Reinstatement is offered subject to the seniority rights of five full-time employees who are currently on lay-off status. Carr will be placed on the company's lay-off list and will be called back to work after full-time employees who are laid-off have been recalled to work.

The Union, which had received none of the letters authored by Respondent, reasonably assumed that it had been agreed that Carr was to be given a June 15, 1979 seniority date for purposes of recall from layoff. Based on this assumption and on a telephone call concerning the compromise reached concerning Carr's backpay, the Union indicated that it was satisfied with the settlement.

On June 30, 1980, the Regional Director wrote Finch and Fruth acknowledging satisfactory compliance with the affirmative requirements of the Board's Order and closing the case, conditional upon Respondent's continued observance of the Order.

III. ALLEGED NONCOMPLIANCE

On August 7, 1980, Respondent began to recall the production employees which it had laid off in February of that year. On August 11 and 26, 1980, Respondent recalled employees who had been hired subsequent to June 15, 1979. This recall was performed in accordance with a seniority list prepared June 27, 1980, which did not contain Carr's name or seniority date. In October 1980, after completion of the recall of all full-time employees who had been laid off in February, a new seniority list was prepared which, at the insistence of the president of the Union's local, contained Carr's name with a seniority date of June 1, 1979.[5] Respondent's seniority lists dated October 20, 1980, and December 11, 1980, both bear this information.

In the third week of August 1980, Lindgren contacted the Board, asserting that Respondent had breached the compliance agreement as the Union understood it. On August 20, 1980, Osthus wrote to Hughes asserting his understanding that, under the compliance agreement, Carr began accruing seniority as of the date of his discharge. On August 21, 1980, Hughes replied to Osthus that Respondent would comply with the agreement as set forth in her June 26, 1980 letter. Subsequent communication between Respondent and the General Counsel was of no avail and, ultimately, the backpay specification which is the subject of this proceeding issued.

IV. ANALYSIS

The issue before me, that is, whether Respondent has complied with the Board's Order in this proceeding, is best resolved in the context of the policy considerations which underlie the Act. The considerations relevant here were succinctly summarized in *Trinity Valley Iron & Steel Co. v. NLRB*, 410 F.2d 1161, 1167–1168 (5th Cir. 1969)

> [T]he policy of the Act is to restore the situation as nearly as possible to the status *quo ante* the unfair labor practice. Such a purpose requires that those deprived of a recognized and protected interest by violations of the Act should be made whole so as to prevent the violator from profiting from his misdeeds. We are aware that a backpay proceeding is designed to vindicate a public, not a private, right as to deter unfair labor practices; the employee is but a beneficiary. Finally, the Act is *remedial*, not punitive, in its aims.

[5] Respondent's plant manager Weiss testified that he had acceded to the Union's request to place Carr on the seniority list without inquiring as to the Union's reason for the request. None of Weiss' testimony was contradicted or rebutted and, based on my observation of his demeanor while testifying, I credit it.

> Translated into practical standards in a reinstatement backpay situation, the balance of the equities is as follows. The Employer is required to place the employee in the same position—with no more advantages and no fewer advantages—than before the discrimination against him for union activities.

A significant portion of the relief required by the Board's Order has been effected and is not at issue here. Thus, it is agreed that Carr has been made whole for the period from his discharge on June 1, 1979, to February 20, 1980, the date on which it is agreed that he would have been laid off had he then been employed by Respondent.

The backpay specification herein seeks backpay for the period from August 1980 to February 25, 1981. This claim is based on the General Counsel's contention that Respondent's liability for backpay extends from the time it began recalling laid-off employees with less seniority than Carr until the date of Carr's actual reinstatement. In order to support this contention, the General Counsel argues that the Board's Order requires that Carr be granted seniority as a full-time employee retroactive to the date of his discharge. In answer, Respondent contends that Carr, as a part-time employee, had no seniority and, therefore, no one with less seniority was recalled prior to the date of Carr's actual reinstatement.

There is no question that Carr was a part-time employee at the time he was unlawfully discharged. The collective-bargaining agreement in effect at that time provided that part-time employees had no seniority. The Board's Order in the unfair labor practice proceeding, which required that Carr be accorded on reinstatement the same seniority he had enjoyed in his former position, could not grant Carr something which he did not have at the time of his discharge, i.e., the seniority of a full-time employee. Thus, Carr's right to recall was junior to that of every full-time worker in Respondent's employ at the time of the February 20, 1980 layoff. Since it is undisputed that Carr was recalled to the first position available after Respondent had completed its recall of the full-time employees laid off on February 20, it must be concluded that no employees with less seniority than Carr were recalled prior to his actual reinstatement.

In attempted contravention of this conclusion, the General Counsel appears to argue that Carr should have been treated as if he had been discharged from a full-time position[6] because he sought conversion to full-time status prior to his discriminatory discharge. There is no evidence that Carr's request was ever considered by members of Respondent's management empowered to act on it. Further, there is no evidence that his request was ever denied. Indeed, there is no evidence in the record before me that, had he not been discriminatorily discharged, Carr would have been other than a part-time employee at the time of Respondent's February 20, 1980 layoff.[7]

Even if it were proper to infer that Carr's request was transmitted by his supervisor to other members of Respondent's management and was denied by them, no allegation was made in the unfair labor practice proceeding that Respondent's failure to convert Carr to full-time status was unlawful. Accordingly, the General Counsel's attempt to provide a remedy for such an inferred denial in the compliance phase of this proceeding is inappropriate, especially in the absence of any indication that the issue was fully litigated before Judge Zankel.[8]

The General Counsel also appears to argue that, because Respondent had previously asserted that Carr's discharge was due to an elimination of part-time employment, Respondent must treat Carr as if he were discharged from a full-time position.[9] This argument suffers from two fundamental defects: its conclusion does not follow from its premise, and it ignores Judge Zankel's finding that the elimination of part-time employment was a subterfuge used to obscure Respondent's unlawful motivation. The fact that a part-time employee was discriminatorily discharged on the pretext that part-time positions were being eliminated does not, standing alone, modify a respondent's legal obligation to reinstate that employee to a part-time position. See *Florsheim Shoe Store Co.*, 227 NLRB 1153 (1977), enfd. 565 F.2d 1240 (2d Cir. 1977), on remand 240 NLRB 919 (1979).[10]

While they have no impact on the outcome of this decision, two additional considerations raised by the parties deserve brief mention. First, a great deal of time and attention were devoted at the hearing and on brief to the question of whether the parties had entered a settlement agreement concerning Carr's seniority for purposes of recall. The outcome of this decision would obviously be unaffected by a determination that no agreement was reached or that an agreement was reached which coincided in effect with the result I have arrived at. Any agreement which did not adequately remedy the violation should be set aside in favor of a de novo examination of Respondent's compliance. See *NLRB v. Armstrong Tire & Rubber Co.*, 263 F.2d 680, 682 (5th Cir.

[6] Although the General Counsel uses the language that "Respondent should reinstate Carr as a full-time employee," I have found it logically necessary to restate the argument in the manner set forth above. A requirement that Carr be reinstated to full-time employment would not require any change in my conclusion that Respondent recalled no employees junior to Carr prior to his reinstatement. The essence of the General Counsel's case is based on the contention that Carr should have had the seniority of a full-time employee as of the date of his discharge. Thus, it is not reinstatement to a full-time position but the existence of retroactive full-time seniority on which the General Counsel depends.

[7] In computing the backpay already received by Carr for the period from June 1, 1979, to February 20, 1980, the General Counsel and Respondent stipulated that they assumed that Carr would have been employed on a part-time basis from October 1, 1979, to February 20, 1980.

[8] Similarly, in the absence of any charge, complaint allegation, or record evidence on the issue of Carr's request to work full time, I do not find merit in the General Counsel's contention that the "spirit" of Judge Zankel's decision requires reinstatement to a full-time position with full-time seniority retroactive to the date of discharge.

[9] See fn. 6, supra.

[10] Two distinctions between the case before me and *Florsheim Shoe Store Co.* are worthy of mention. First, an employer's freedom to implement economic policy, which was the subject of a portion of the court of appeal's opinion, is not in issue here. Second, in *Florsheim Shoe Store Co.*, Respondent offered full-time reinstatement to employees who wished to regain their part-time positions; here, Carr accepted reinstatement to full-time employment without protest. It is clearly inappropriate to punish Respondent for offering more than it was legally required to offer (i.e., reinstatement to a part-time position) by requiring it to also offer full-time seniority retroactive to the date of discharge.

1959), enfng. 119 NLRB 353 (1957); *Ace Beverage Co.*, 250 NLRB 646, 648-49 (1980). Finally, an agreement which would have compensated Carr to an extent greater than was necessary to make him whole would be punitive, rather than remedial. The imposition of such an award would run counter to the policies underlying the Act and would be beyond the Board's authority. *NLRB v. J. S. Alberici Construction Co.*, 591 F.2d 463, 470 (8th Cir. 1979); *NLRB v. Plumbers Local 2*, 360 F.2d 428, 434 (2d Cir. 1966); see generally, *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961). Thus, the existence or nature of a settlement agreement is logically immaterial to the disposition of this case.

Second, the General Counsel asserts that Carr is entitled to backpay for the period August 1980 through February 1981 because Respondent never made an offer of reinstatement directly to Carr and Respondent's backpay obligation therefore continued to run until Carr was actually reinstated on February 25. Given the General Counsel's admission that no backpay is due prior to the time Carr should have been recalled and my conclusion that Carr should have been recalled on February 25, 1981, no further award of backpay is due by virtue of Respondent's failure to make a proper offer of reinstatement.

In summary, Carr was recalled in a manner dictated by the fact that, at the time of his discharge, he held a position without seniority rights. His recall in this manner therefore places him in the position he would have occupied but for his unlawful discharge. Accordingly, I conclude that Respondent's compliance with the Board's Order restores the status quo ante the violation and Respondent is not liable for the backpay sought by Specification herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The backpay specification is dismissed in its entirety.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.